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E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

--70--215

In the Matter of Anthony F. Avallone,

Attorney at Law, Petitioner

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE
OF NEW MEXICO

ANTHONY F. AVALLONE
Petitioner Pro Se
456 North Alameda Blvd.
Las Cruces, New Mexico
88001

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IN THE SUPREME COURT OF THE UNITED STATES

- - - - - -

In the Matter of Anthony F. Avallone,

Attorney at Law, Petitioner

- - - - - -

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE
OF NEW MEXICO

To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States.

Anthony F. Avallone, the petitioner herein prays that a writ of certiorari issue to review the order of the Supreme Court of the State of New Mexico entered in the above entitled disciplinary proceeding on April 19, 1971 and its order denying a motion for a rehearing entered on May 13, 1971.

OPINIONS BELOW

The opinion of the Supreme Court of the State of New Mexico (R. 933) is not officially reported and is printed in the Appendix, pages A 1-8. The order denying rehearing is printed in the Appendix, page A 10.

JURISDICTION

The order of the Supreme Court of the State of New Mexico was made on April 19, 1971, Appendix, page A 9. A timely motion for rehearing was denied on May 13, 1971, Appendix, page A 10. The jurisdiction of the Court is invoked under 28 USC § 1257 (3).

QUESTIONS PRESENTED

This is an original disciplinary proceeding in the Supreme Court of the State of New Mexico against petitioner, an attorney. The Board of Bar Commissioners heard the charges and reported its findings. The attorney excepted only to the findings and recommendations as to Charge IV, a violation of Canon 30 of the Canons of Professional Ethics, unjustifiable litigation. The Supreme Court of New Mexico adopted the findings and recommendations as to Charge IV, one Justice dissenting. The questions presented are:

1. Was petitioner deprived of due process of law where there was no evidence, nor a finding of fact, as to two essential factual aspects of the grievance:

(a) was he convinced that certain litigation he instituted was intended (b) merely to harass and injure or work oppression or wrong in violation of Canon 30?

2. Was petitioner deprived of equal protection of the law where a finding that litigation "was filed with the intention of harassing and injuring defendant" is held to sustain a violation of Canon 30 where it is unprofessional "to conduct a civil cause... when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong"?

3. Was petitioner deprived of due process of law and equal protection of law in an attorney's disciplinary proceeding requiring findings on clear and convincing evidence when the charge against him is not supported by clear and convincing evidence?

STATUTES INVOLVED

The constitutional provisions involved are the due process and equal protection clauses of the 14th Amendment and the freedom of speech provisions of the 1st Amendment. The New Mexico Supreme Court Rules on the discipline of attorneys are contained in § 21-2-1(3), New Mexico Statutes Annotated, Appendix pages A 11-20. Canon 30 of the Canons of Professional Ethics is set forth at page A 21 of the appendix.

STATEMENT OF THE CASE

The Board of Bar Commissioners as Referees heard evidence and made a report of it's findings and recommendations to the New Mexico Supreme Court (R 2). Petitioner raised exceptions to Charge IV (R 9), the violation of Canon 30, unjustifiable litigation, and urged that there was no finding that petitioner was convinced that the litigation was intended merely to injure and harass (R 10). In his brief (R 829) and again in his brief in support of his motion for rehearing (R 943), the inadequacy of the findings are underscored. The dissenting Justice (R 938) saw that there was no finding on the state of petitioner's mind and whether he was convinced of anything as to his client's intentions. The testimony of the client, Mr. Borst, (R 371-437) and

petitioner's testimony (R 505-515, 578-601) identify the series of facts that led to the complaint (R 699) that was filed. The freedom of speech issue was raised in the brief in support of the motion for rehearing. (R 945) by pointing out the limitations imposed on a lawyer by the State Court's interpretation of Canon 30.

REASONS FOR GRANTING THE WRIT

The privilege of practicing law is a right that is protected by the 14th Amendment to the United States Constitution. Re Summers, 325 US 561, 89 L Ed 1795, 65 S Ct 1307. The proceedings which would lead to the deprivation of that right must be characterized by fundamental fairness: due process of law. Schware v. Board of Bar Examiners, 353 US 232, 1 L Ed 2d 796, 77 S Ct 752, 64 ALR 2d 288. Similarly, the rules of conduct and disciplinary procedure shall apply alike to all attorneys affording them equal protection of the law.

Canon 30 says that litigation is unjustifiable when: (1) the lawyer knows his client's intentions in bringing the case; (2) the case is merely, or only for the purpose of injuring and harassing the opposite party; (3) the lawyer is convinced that this is the only purpose and there are no legal merits to the client's case.

The findings of the Board of Bar Commissioners (R 2 at 5) do not include these elements. Finding 4 (R 6) merely recites: "such action was unjustifiable and that it was filed with the intent to harass and injure the defendants". There is no finding that petitioner was convinced that the litigation

was intended merely to harass and injure. Neither will the evidence support a finding that petitioner was convinced the litigation was intended merely to harass and injure. Consider petitioner's explanation for making the case (R 508-512, 600, 601).

The Supreme Court of New Mexico never addressed itself to this omission and identified the question before it as one of determining if the findings were supported by clear and convincing evidence (R 936). The dissenting Justice caught part of the omission about being convinced (R 938), but he too, failed to note that the lawyer is to be convinced that the litigation has no legal merit and is merely to harass and injure.

The Supreme Court of New Mexico has denied petitioner due process by ordering his suspension from the practice of law where there is no finding of fact, nor any supporting evidence, that petitioner was convinced the litigation he brought was merely to harass and injure. Thompson v. Louisville, 362 US 199, 4 L Ed 2d 654, 80 S Ct 624, 80 ALR 2d 1355; Re Sawyer, 360 US 622, 3 L Ed 2d 1473, 79 S Ct 1376.

The Supreme Court of New Mexico has denied petitioner due process and equal protection of law (1) by ignoring its own rules (Rule 1.10, Appendix A 14) requiring that there be clear and convincing evidence to sustain a finding of unprofessional conduct and (2) by arbitrarily changing the stricture of Canon 30 to make unjustifiable litigation any case that intends to injure and harass an opposite party. Disciplinary

proceedings are quasi-criminal in nature, Re Ruffalo, 390 US 544, 20 L Ed 2d 117, 88 S Ct 122, and a lawyer has a right to expect that rules will be applied.

The Supreme Court of New Mexico has also invaded the province of the lawyers conscience, an area where he enjoys 1st Amendment freedoms. If the Supreme Court of New Mexico can require that a lawyer must conform to the collective conscience of the local bar when deciding to initiate litigation, the individual lawyer can never hope to be free. This approach places a lawyer in serious peril since most litigation involves harassment and injury and he would forever be subject to a grievance charge.

The second sentence of Canon 30 seems to have been forgotten: that a lawyer has the right to present his client's case for a determination by the Court on the merits. If the 1st Amendment means anything, petitioner submits it does not countenance such infringement on the freedom of conscience and speech of a lawyer. NAACP v. Button, 371 US 415, 9 L Ed 2d 405, 83 S Ct 328; Thomas v. Collins, 323 US 516, 89 L Ed 430, 65 S Ct 315.

There is an unusual ground for granting this writ that has a touch of irony. The New Mexico Constitution has a provision (Art. VI, § 2) which gives an aggrieved party an absolute right of appeal in all cases (Appendix A 22). However, in this original disciplinary proceeding, petitioner is sorely aggrieved and has nowhere to go, except to petition the United States Supreme Court.

CONCLUSION

For the reasons given, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ANTHONY J. AVALLONE
Petitioner Pro Se
456 North Alameda Blvd.
Las Cruces, New Mexico
88001

FILED: April 19, 1971

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

IN THE MATTER OF ANTHONY F. AVALLONE; Attorney at Law

NO. 8 8 9 7

RECEIVED
APR 20
ANTHONY F. AVALLONE
LAS CRUCES, NEW MEXICO

ORIGINAL DISCIPLINARY PROCEEDING

PAUL A. PHILLIPS,
Albuquerque, New Mexico.

Attorney for Appellant

ROBERT S. SKINNER,
Raton, New Mexico.

Amicus Curiae, on behalf of the Board of Bar Commissioners

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O P I N I O N

COMPTON, Chief Justice.

This is a disciplinary proceeding instituted against Anthony F. Avallone, an attorney practicing in Las Cruces, New Mexico. He was charged with five counts of unethical conduct. The matter was heard by the Board of Bar Commissioners, sitting as referees of this Court, pursuant to our Rule 3(1.10) (§ 21-2-1(3)(1.10), N.M. S.A. (1953 Comp.). Counts III and V were dismissed for lack of evidence. With regard to the remaining counts, the Board made the following findings of fact, conclusions of law and recommendation:

"COUNT I, FINDINGS OF FACT.

"1. That on or about October 15, 1968, in Las Cruces, New Mexico, the Respondent attended a meeting of a group of persons concerned with problems of urban renewal and spoke to the group on condemnation procedures advising them of their rights and volunteered advice to bring lawsuits. His conduct at that meeting was such as to incite the group and stir up strife and litigation.

"2. At the aforesaid group meeting, Respondent advised the assembled group that he would represent them as their attorney on a contingency basis.

"3. That at the aforesaid group meeting, the Respondent solicited professional employment either directly or indirectly.

"CONCLUSION OF LAW

"That the Respondent's actions and conduct at the group meeting in Las Cruces on or about October 15, 1968, were in violation of Canons 27 (Advertising, Direct or Indirect) and 28 (Stirring Up Litigation).

"RECOMMENDATION

"As to Count I of the Committee's Complaint, the Board of Bar Commissioners recommend that the Respondent be reprimanded.

"COUNT II, FINDINGS OF FACT

"1. That the Respondent caused his name to be listed in the Las Cruces, New Mexico, telephone directory in three separate places, one of which was in connection with a Las Cruces realty company wholly owned by him. He also had the same telephone number for two other businesses which he set up, those being the MTG Mortgage Broker and the New Mexico Financial Planning Services Bonded Trust, both of which are, or would have been, relative to the Respondent's law practice. That common telephone number appears in the Las Cruces telephone directory nine times.

"2. That the Respondent continued a separate business known as the 'A-Realty Company' from the same office, or set of offices, in which he practiced law in Las Cruces, New Mexico, utilizing a common telephone number, reception room and secretary and telephone operator. His realty company advertised by three methods; newspaper advertisements, a listing in the Las Cruces telephone directory in which the Respondent's name is shown, and by a prominent sign in the front of the common offices of the Respondent which was displayed with the Respondent's law office sign, with substantially the same printing.

"3. That the listings in the telephone directory of the businesses other than the Respondent's law office, have been discontinued as of the date of the hearing on this matter, and that the sign and office of 'A-Realty Company" have been removed from the Respondent's law office premises.

"4. Proof of feeding the Respondent's law practice by his other businesses was not established.

"CONCLUSIONS OF LAW

"1. That the actions and conduct of the Respondent in procuring telephone listings in the Las Cruces telephone directory and utilizing a common phone number for his law practice, his realty company and his other related businesses were in violation of Canon 27 of the Canons of Professional Ethics.

"2. That the Respondent's actions and conduct in utilizing the common signs in front of his law office to advertise both his law office and his realty company were in violation of Canon 27 of the Canons of Professional Ethics.

"RECOMMENDATION

"That as to Count II of the Committee's Complaint the Respondent should be reprimanded.

"COUNT IV, FINDINGS OF FACT

"That the Respondent was attorney for defendant Borst in Cause No. 21870, Third Judicial District, participated in an agreement for installment payment of a lesser amount than said judgment provided for in said Cause No. 21870.

"2. That said agreement was not performed by the defendant and that Respondent knew that it had not been performed.

"3. That Respondent knew and had notice that the agreement had been rescinded for non-performance by the plaintiff, but, notwithstanding that notice, went with defendant and obtained from the Escrow Agent satisfaction of judgment and release of transcript of judgment.

"4. That defendant thereafter, with Respondent as his attorney, caused to be filed an action against plaintiff Clair and his attorneys Garland, Martin and Martin, Cause No. 22794, that such action was unjustifiable, and that it was filed with the intention of harassing and injuring the defendants.

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"CONCLUSIONS OF LAW

"That Respondent's conduct as attorney for plaintiff in bringing suit against the defendants in Cause No. 22974 resulted in working only harassment and injury to defendants, and such conduct was in violation of Canon 30, Justifiable and Unjustifiable Litigation, Canons of Professional Ethics."

"RECOMMENDATION

"As to Count IV of the Committee's Complaint it is recommended that Respondent be suspended from the practice of law in the State of New Mexico with leave to apply for reinstatement after a period of one hundred twenty (120) days."

Appellant does not challenge the report of the referees with regard to Counts I and II. His challenge is limited to findings under Count IV only. The decisive question is whether the findings are supported by clear and convincing evidence. Canon 30 of the Canons of Professional Ethics reads:

"30. Justifiable and Unjustifiable Litigation.

"The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination."

The record is voluminous, nevertheless, we have carefully considered the evidence and, when viewed in light of the Canon, we can reach no other logical conclusion than that the respondent caused to be filed the action against Clair and his attorneys with the intent to harass and injure the defendants.

Borst, a witness for the respondent, testified that he instituted the action against Clair and the attorneys because they had harassed him in a former suit which he had lost, and that respondent was made aware of the purpose of the suit against Clair and the attorneys. The evidence points up unerringly Borst's purpose in filing the action

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against Clair and his attorneys. While Borst attempted to take full responsibility for bringing the action, respondent was in no position to side-step his responsibility as an attorney in bringing the action.

Amicus curiae urges us to review the evidence under counts III and V and subject the respondent to further discipline. Possibly, the evidence would support his position; nevertheless, we are inclined to follow the recommendations of the referees.

The recommendations of the referees should be adopted, with costs assessed against the respondent.

IT IS SO ORDERED.

s/ J. C. Compton
Chief Justice

WE CONCUR:

s/ Paul Tackett J.

s/ John B. McManus, Jr. J.

Stephenson, J., dissenting.

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STEPHENSON, J., dissenting.

I must dissent from the opinion of the majority insofar as it relates to Count IV of the complaint, to which my comments are limited. I do so with reluctance not only in deference to my learned brethren, but also to the distinguished attorneys who are members of the Board of Bar Commissioners of the State Bar of New Mexico (the Board). Without their unselfish and valued services this court would find it virtually impossible to cope with problems arising in the field of ethics, grievances and discipline.

The first sentence of Canon 30, with which we are here concerned, if it is parsed into its constituent elements, requires the following as a prerequisite to violation:

A. The client or litigant in the existing or prospective litigation must intend to harass or to injure or to work oppression or wrong on the opposite party. The intent here is of the client.

B. The lawyer must be convinced that the client's intention is as described in A above.

My dissent is primarily based on B above. Although Finding No. 4 is probably sufficient insofar as the client's purpose and intention are concerned, it is completely silent as to the state of the attorney's mind. It says that Mr. Avallone represented Mr. Borst, but fails entirely to find that Mr. Avallone was convinced of anything as to Mr. Borst's intentions. The finding therefore fails to support the conclusion and the recommendation.

Secondly, it is implicit in Finding No. 4 and in the majority opinion that Mr. Avallone is regarded as being guilty of wrongdoing in representing Mr. Borst in the suit against Mr. Clair. I feel that this is erroneous for two reasons. He was not charged with any wrongdoing in suing Mr. Clair, the charge relating solely to the suit against the attorneys. Moreover, I fail to see why Mr. Avallone is subject to criticism for having acted as attorney in a suit against Mr. Clair. Regarding the settlement agreement to

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which reference is made in Finding No. 1, the evidence is clear that Mr. Clair and his attorney had indulged Mr. Borst; had granted him extensions and had not insisted on prompt payment as provided in the agreement, although there is a conflict in the evidence as to whether a final extension was granted. I realize Mr. Clair's attorney took the position that the settlement agreement was at an end, but Mr. Avallone took the position that it was not. I fail to see why the position of one is more final or binding than of the other. Neither was in a position to pass decrees. It seems to me there was an honestly debateable legal issue as to whether or not Mr. Clair could, under the circumstances, " *** abruptly rescind for noncompliance without fair warning of an intention to insist upon a literal compliance with the contract in the future." Nelms v. Miller, 56 N.M. 132, 241 P.2d 333 (1952); see also Trujillo v. Collins, our number 9064, opinion filed November 16, 1970, ____N.M.____, 477 P.2d 820 (1970).

The first count of the cause in question, 22794, sought a declaratory judgment as to whether the contract was or was not rescinded, an appropriate device, and the second count was for damages. Plaintiffs lost cause No. 22794. Happily, loss of lawsuits by dismissal on motion or otherwise does not necessarily carry any adverse ethical imputation, or our ranks would be considerably depleted. The merits of cause No. 22794 was not the issue presented to the Board for its decision.

Let it be understood that I hold no brief for Mr. Avallone insofar as suing Mr. Clair's lawyers is concerned. In my view, Mr. Avallone never advanced any reasonable, or credible reason for having sued the attorneys. It is stated in G. Warvelle, Legal Ethics, § 323 (2d ed. 1920):

> "Suits against attorneys. A retainer may properly be accepted in a suit against an attorney, yet, as a rule, it should be

> received reluctantly and the matter settled, if possible, in an amicable manner. The principle of professional fraternity, as far as it will apply, should characterize all proceedings of this nature, particularly where no moral turpitude is involved. This has long been the settled rule of the ethical code and is still in force, notwithstanding its non-observance by the legal tradesman."

I have said that I believe an essential element of a violation of Canon 30 is lacking. Unfortunately, the rules by which we are bound preclude us from supplying the missing factual elements, however richly justified such a step might be from the state of the record. Supreme Court Rule 3(1.12) [§ 21-2-1(3)(1.12) N.M.S.A., 1953]. See also Rule of Civil Procedure 53(e)(2) [§ 21-1-1(53)(e)(2), N.M.S.A., 1953]; 45 Am. Jur. "References" § 37. In my opinion, the cause should be remanded to the Board with directions to make findings upon the issue of Mr. Avallone's convictions. It is stated in 45 Am. Jur. "References" § 46, that:

> "If the referee's report is incomplete in that he fails to make findings on all the issues, the court should send the report back to the referee with instructions to make findings on all material issues."

See also Rule of Civil Procedure 53(e)(2), supra.

For the foregoing reasons I dissent. Although the findings I have criticized regarding cause No. 22974 insofar as it pertained to Mr. Clair might be regarded as surplusage, I feel that the essential factual element missing from the findings as to Mr. Avallone's state of mind leaves me no alternative.

s/ Donnan Stephenson
JUSTICE

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Monday, April 19, 1971

NO. 8897

IN THE MATTER OF ANTHONY F.
AVALLONE, ATTORNEY AT LAW. Original Disciplinary Proceeding

This cause having heretofore been argued, submitted and taken under advisement and the Court, being now sufficiently advised in the premises, announces its decision by Chief Justice Compton, Mr. Justice Tackett and Mr. Justice McManus concurring, Mr. Justice Stephenson dissenting, adopting the recommendations of the referees, with costs assessed against the Respondent, for the reasons given in the opinion of the Court on file;

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED that the recommendations of the referees in the above entitled cause be and the same are hereby adopted, and costs shall be assessed against the Respondent.

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Thursday, May 13, 1971

No. 8837

IN THE MATTER OF KATHRYN F. APPELGATE, ATTORNEY AT LAW.

This matter coming on for consideration by the Court upon motion of Respondent for a rehearing, and the Court having considered said motion and brief of counsel and being now sufficiently advised in the premises;

IT IS ORDERED that motion of Respondent for rehearing be and the same is hereby denied.

ATTEST: A True Copy

Lois Marie Caldwell

Clerk of the Supreme Court
of the State of New Mexico

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2. The rules governing requirements for admission to the bar adopted pursuant to sec. 1 hereof will be furnished by the clerk of the Supreme Court upon request of any applicant.

Discipline. 3. The purpose of discipline of lawyers is the protection of the public, the profession, and the administration of justice, and not the punishment of the person disciplined.

Only persons of integrity and good character should be permitted to practice law.

Persons admitted to practice law in this state are a part of the judicial system of the state and officers of its courts.

A license to practice law confers no vested right, but is a conditional privilege, revocable for cause.

This court has the inherent power and the duty to prescribe the qualifications that shall be required for admission to practice law; to admit persons to practice law; to prescribe standards of conduct for lawyers; to determine what constitutes grounds for the discipline of lawyers; to discipline, for cause, persons admitted to practice law in this state; and to revoke the license of every lawyer whose unfitness to practice law has been duly established. This court may not properly delegate the final exercise of such power or duty, or recognize the existence of either elsewhere than in itself.

It is impossible to determine at the time of suspension of a license to practice law when, if ever, the person whose license is revoked will become qualified for re-admission. Therefore, suspension should not be for a stated period, and should place on the person whose license has been revoked and who seeks re-admission the burden of establishing by clear and convincing proof that he possesses the qualifications for re-admission, which should not be less than those required for original admission.

It is the obligation of the organized bar and the individual lawyer to give unstinted cooperation and assistance to the highest court of the state in discharging its function and duty with respect to discipline and in purging the profession of the unworthy.

In the exercise of such inherent jurisdiction pertaining to admission of persons to practice law and to discipline, for cause, all

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such persons, the court adopts and promulgates the following rules, which shall govern disciplinary proceedings against members of the New Mexico Bar:

Part One

1.01 The members of the board of commissioners of the State Bar, elected and serving from time to time, are hereby appointed standing referees of this court, and are hereby empowered to hear complaints against members of the bar for unprofessional conduct looking to disciplinary action by this court. Less than the entire membership of said board may sit as referees, but not less than three members shall constitute a quorum. No commissioner appointed and acting hereunder shall receive any compensation for his services. Each commissioner shall receive his necessary expenses connected with the performance of his duties hereunder, which shall be paid by the state bar association.

1.02 The board of commissioners, upon the filing with it of charges of misconduct by a lawyer licensed to practice before this court, whether such misconduct occurred either within or without this state, shall have power to hear the matter and make and report to this court its findings of fact, conclusions and recommendations.

In cases in which accusations are filed with the commissioners as herein provided, the cause will thereafter proceed as a trial in court, and in accordance with these rules. In the discharge of their duties the commissioners may call to their assistance other members of the bar of this state.

The president of the board of bar commissioners shall appoint a committee on ethics, grievances, and discipline, composed of members of the board of bar commissioners, which shall make preliminary investigations of misconduct by lawyers licensed to practice before this court. Such investigations may be instituted on formal or informal complaint or upon information, oral or written, of such misconduct received by the committee from any responsible source.

1.03 Before the filing of written charges against a lawyer, such preliminary investigation shall be made by the committee on ethics, grievances, and discipline as to determine whether or not a formal proceeding shall be instituted by filing such charges, and a formal hearing had thereon. The committee may in its discretion afford the the lawyer an opportunity to be heard during the course of the pre-

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liminary investigation, either by the committee or a member thereof designated by the committee to act for it.

1.04 Unless in an extraordinary case, with permission of the court, the commissioners on their own motion shall direct that written charges shall be filed without being signed, they must be signed by the person or persons aggrieved or by the chairman of the committee on ethics, grievances, and discipline. The charges shall be sufficiently clear and specific reasonably to inform the respondent of the misconduct charged. Service of the written charges shall be made upon the respondent in accordance with these rules. The response of the respondent must be in the form of a written answer, in which he shall specifically admit or deny the allegations of the charges. The respondent may not challenge the complaint by demurrer or motion, but he may incorporate in his answer the objection that the commissioners do not have jurisdiction, or the objection that the acts or omissions alleged in the charges do not constitute misconduct which would warrant the imposition of discipline. If the respondent shall fail either to file an answer or to appear at the time fixed for the hearing, he shall be deemed to be in default. When called upon to answer or give testimony, the respondent shall make specific and complete disclosures as to all material matters. In a default proceeding any testimony may be taken and all evidence may be produced and considered by the commissioners, and findings of fact, conclusions of law, and recommendations shall be submitted to this court based upon such evidence.

1.05 Not less than three commissioners shall constitute a quorum. The members of the committee on ethics, grievances, and discipline shall act as attorneys for the prosecution before the board of commissioners, but shall not participate as referees of this court at such hearings. Commissioners constituting a quorum shall have power to conduct a hearing and report to this court their findings of fact, conclusions, and recommendations.

1.06 The proceedings under these rules shall not be public, and the hearing before the commissioners shall be private and confidential, unless the respondent shall request otherwise. The record shall not be made public unless and until a report recommending discipline shall be filed with the court.

1.07 The costs of all proceedings before the board of commissioners shall be paid in the first instance by the state bar associa-

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tion, subject to assessment against the respondent, if the board or this court so determines.

1.08 The committee on ethics, grievances and discipline and the board of commissioners may:

(a) Administer oaths and affirmations and hear evidence.

(b) Compel, by subpoena, the attendance of witnesses and production of pertinent books, papers, and documents.

(c) Tax costs against the respondent.

The subpoena may be issued and the oath or affirmation administered by any of the commissioners or by any member of such committee.

A witness shall be paid mileage and witness fees as provided by the law of this state in civil cases.

Depositions may be taken and used in the same manner as in civil cases.

A record shall be made of all proceedings before the board of commissioners.

1.09 Whenever any person subpoenaed to appear and give testimony or to produce books, papers or documents, refuses to appear or to produce such books, papers, or documents, or whenever any person, having been sworn to testify, refuses to answer any proper question, he shall be guilty of contempt of this court.

The Committee on ethics, grievances, and discipline or the commissioners shall report to this court the facts relating to any such contempt. Thereupon such proceedings shall be had as in cases of other civil contempt.

1.10 To warrant a finding of misconduct in contested cases, the facts must be established by clear and convincing evidence, and, in cases where the respondent defaults, by prima facie evidence.

On a charge of solicitation of professional employment, through a lay person or agency, it shall not be necessary to prove that such lay person or agency received compensation.

When not otherwise provided herein, the practice in disciplinary proceedings shall be governed by applicable rules of civil procedure.

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1.11 Service of a copy of the written charges, together with a notice of the proposed hearing, shall be made either by personal service, within or without this state, or by the secretary of the Board of Bar Commissioners by mailing the same, certified mail with return receipt requested, to the respondent at his last known address; provided, however that substituted service may be made as hereinafter set forth. Such service shall be completed at least twenty (20) days prior to the date set for hearing, and the return receipt for certified mail or a satisfactory showing of personal service shall be made a part of the record in such proceedings. When a member of the committee on ethcis, grievances, and discipline or other person, having knowledge of the facts, designated so to do by the state bar commissioners, shall file in the office of the secretary of the Board of Bar Commissioners an affidavit stating that any respondent resides or has gone out of this state or on due inquiry cannot be found, or is concealed within this state, so that notice cannot be served upon him; and either stating the present place of residence of such respondent, or averring that upon diligent inquiry his place of residence cannot be ascertained and stating his last known place of residence, the secretary of the Board of Bar Commissioners shall cause publication to be made in some newspaper of general circulation in the county of respondent's last known place of residence within this state, as set forth in such affidavit, containing: (1) the title of this court, (2) the name of the respondent, (3) notice of the pendency of the proceedings, and (4) the time and place of the hearing of the cause. He shall also within ten days from the first publication of such notice send a copy thereof by mail, addressed to such respondent at his last known place of residence. The certificate of the secretary of the Board of Bar Commissioners that he has sent such a copy in pursuance of this provision shall be proof thereof. Such notice shall be published once a week for three consecutive weeks, the first insertion of which shall be at least thirty days before the date set for the hearing by the commissioners; and unless said time has intervened no proceedings therein shall be had; provided, that in case the respondent personally appears and consents to the hearing the cause may be heard at an earlier time.

1.12 At the conclusion of the hearing, the Commissioners shall make a report to the court of their findings of fact and conclusions and recommendations, attaching thereto a copy of the original complaint, proof of service, and the answer, if any, of the respondent.

(38)
(12-11-1953)

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Thereupon the matter shall be docketed in the name of the respondent and the president of the board of commissioners shall designate one or more of its members to act as amicus curiae in support of its recommendations. Upon the filing of such report, a copy thereof shall be served upon the respondent by certified mail at his last known post office address, and proof of such service shall be filed in this court. The respondent, if not in default, may file exceptions to the report within twenty (20) days from the date of mailing of a copy of such report to him, or within an additional period not to exceed twenty (20) days granted by the court for good cause shown. Unless such exceptions are predicated solely upon the report, the respondent, within ten (10) days after the filing of such exceptions, shall file with the commissioners a designation of such parts of the record as he deems necessary to enable the court to pass on such exceptions, and within ten (10) days thereafter the amicus curiae may file a designation of any additional parts of the record he deems necessary to enable the court to pass on such exceptions. The commissioners shall furnish the respondent with an estimate of the cost of an original and two (2) copies of the part of the record so designated. Thereupon the commissioners shall promptly certify to the court the parts of the record so designated.

(The foregoing amendment effective forthwith.)

Upon the filing of the certified record, briefs shall be filed within the times fixed by the rules governing civil appeals and the matter shall be disposed of expeditiously.

Where a respondent fails to file exceptions to the report upon motion made by the amicus curiae, the court may enter an order giving effect to the recommendations contained in the report.

The court will adopt a finding of fact made by the commissioners unless, upon a consideration of all the record certified up, as above provided, it is of the opinion that such finding is not supported by clear and convincing evidence.

Upon submission of the matter to this court, it shall either impose discipline or dismiss the proceedings.

1.13 The court in its discretion may direct the filing of written charges.

(35)
(12-11-1963)
(43)
(6-5-1968)

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1.14 If discipline is not recommended, the commissioners shall either dismiss the proceedings or order the charges and the record to be placed on file to be considered further in the event of the filing of other charges or the production of additional evidence.

Part Two

2.01 All of the members of the bar have taken an oath to support the Constitution and the laws of this state and of the United States. As officers of the court, they are charged with obedience to these laws, both in and out of court, and to observe the high standards of professional conduct. Traditionally, standards for lawyers have been higher than expected of laymen. A license to practice law is a proclamation by this court that the holder is one to whom the public may entrust professional matters. The lawyer must be true to that trust and his confidential relationship to his client, whether such client be a public body or a private individual.

2.02 The court does not undertake by these rules to promulgate a code governing all causes for discipline. The enumeration here of certain categories of misconduct as constituting grounds for discipline shall not be deemed to be all-inclusive, nor shall the failure to specify any particular act of misconduct be construed as tolerance thereof by this court.

2.03 The fact that certain acts of unprofessional conduct may at times have remained unchallenged shall not excuse a wrong-doer.

2.04 The commission of any act contrary to honesty, justice or good morals, whether the act is committed in the course of his relations as an attorney or otherwise, and whether or not the act is a felony or misdemeanor, constitutes a cause for discipline. If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to discipline.

Knowingly or willfully advocating, abetting, advising, or teaching the duty, necessity, desirability or propriety of overthrowing or destroying the government of the United States or the government of any state, territory, district, or possession thereof by force or violence, or any other violation of the provisions of 18 U.S.C. Sec. 2385, shall constitute a cause of discipline.

A lawyer who has acted contrary to the standards of conduct set forth in the canons of ethics of the American Bar Association,

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heretofore adopted as rules of conduct for attorneys in this state, may be found guilty of conduct constituting a cause for discipline.

2.05 The fact that an act is *malum prohibitum* rather than *malum in se* shall not, in and of itself, constitute a defense to a charge of misconduct.

2.06 An adjudication of misconduct in a disciplinary proceeding by a court of another state in which an attorney has been licensed to practice shall be considered as conclusive proof of such misconduct in a disciplinary proceeding in this state. Conviction of a crime involving moral turpitude shall be conclusive proof of the guilt of the respondent, and a plea of guilty or a plea of *nolo contendere*, where followed by a judgment of conviction, shall be deemed to be a conviction within the meaning of this rule.

2.07 Where money or other property has been entrusted to an attorney for a specific purpose, he must apply it to that purpose. He may not avail himself of a counterclaim or set off for fees against any money or other property of his clients coming into his hands, and a refusal to account for and deliver over such money or property upon demand shall be deemed a conversion. This does not apply to the retention of money or other property upon which the lawyer has a valid lien for his services, provided the same is kept separate from his own funds and is not converted to his own use. Controversies as to the amount of fees shall not be considered a basis for charges in a disciplinary proceedings unless it is charged that the amount demanded as fees is extortionate or fraudulent.

Part Three

3.01 Discipline shall be: (a) permanent disbarment, or (b) suspension for an indefinite period, subject only to termination as hereinafter provided, or, (c) censure, or (d) such other action by the court as it deems proper.

In fixing the degree of discipline to be imposed for misconduct, the commissioners and the court shall consider prior misconduct resulting in discipline, and shall also be entitled to consider charges not resulting in discipline.

At the time of the entry of an order of suspension, the court will fix a minimum period which must elapse before the court will entertain a motion by the respondent for termination of suspension. The entry of such order shall not be construed to imply

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that the respondent will be entitled to the termination of his suspension at the end of such minimum period.

3.02 Any attorney who shall have been suspended may by petition apply for termination of such suspension after the minimum period fixed by the court under section 3.01 shall have elapsed. Application for termination of suspension shall be by verified petition filed with the clerk of this court, setting forth:

(a) the report and recommendations of the commissioners, the order of discipline and the published opinion, if any, of this court;

(b) facts showing he has rehabilitated himself and is otherwise entitled to have the order of suspension terminated.

3.03 Unless denied by the court forthwith for insufficiency in form or substance, the clerk shall forward a copy of the petition, in the first instance, to the committee on qualifications for admission to the bar, which shall report expeditiously to the board of bar commissioners their findings, conclusions and recommendations. The clerk of this court shall notify the applicant of the filing of such report. The procedure before the board of bar commissioners shall be governed by the applicable provisions of these rules governing disciplinary proceedings. However, the burden shall be upon the applicant for termination of suspension to establish the averments of his application by clear and convincing evidence. Thereupon the board of bar commissioners shall report to this court their findings, conclusions, and recommendations.

If the report recommends denial of the petition, the petitioner shall have fifteen days from the date of mailing of the notice of such filing to file exceptions thereto. Neither briefs nor oral arguments shall be permitted, except when specially authorized by the court. If the report recommends denial of the petition, the matter shall be submitted for consideration by the court on the report of the commissioners and the exceptions of the petitioner; but if the report recommends termination of suspension, the matter shall be submitted for such consideration on the report alone. Thereupon, the court shall make such order as it deems proper. The commissioners, upon request of the petitioner and his payment of the actual cost thereof, shall certify to the court the complete record of the proceedings before the commissioners.

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3.04 A lawyer who, pending investigation of misconduct or while charges of misconduct against him are pending, voluntarily surrenders his license to practice law in this state, when such surrender has been accepted by this court, shall not thereafter be admitted to practice law in this state.

3.05 The clerk of this court shall maintain a separate and permanent record of disciplinary proceedings setting forth the following facts:

A. Number of case;
B. Name of respondent;
C. General nature of charges;
D. Disposition of matter;
E. Termination of suspension of respondent, if ordered, and date of order.

Part Four

4.01 A lawyer who has been adjudged insane or mentally incompetent shall be suspended from the practice of law until further order of the court. If restored in competency, he may apply for termination of suspension.

4.02 A lawyer who has become addicted to the use of alcohol or narcotic drugs to an extent materially influencing his judgment or legal ability, or his ability to handle the affairs of his clients, may be found guilty of conduct constituting a cause for discipline.

4.03 Conduct showing a member to be unfit or incompetent to act as an attorney in handling the legal business of others, may constitute cause for discipline.

(Rule 3.3 of Supreme Court Rules is hereby repealed, and the foregoing be and the same is hereby adopted in lieu thereof as Rule 3.3.)

ORDER ADOPTING RULES.

It is ordered by the Court that the above rules governing disciplinary proceedings shall become effective on November 1, 1960, and the clerk is hereby directed to have the same printed and to distribute a copy to each member of the Bar of the State of New Mexico in not less than thirty (30) days prior to the effective date.

Dated this 22nd day of August, 1960.

Failure or refusal to pay license fee — Citation to show cause. 4. Whenever the board of commissioners of the state bar shall cause

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30. Justifiable and Unjustifiable Litigation.

The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

CONSTITUTION OF NEW MEXICO

ARTICLE VI

§ 2. [Supreme Court's appellate jurisdiction.]

Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as may be provided by law; provided that an aggrieved party shall have an absolute right to one appeal.

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IN THE

Supreme Court of the United States

No. 71-215

IN THE MATTER OF ANTHONY F. AVALLONE,
Attorney at Law, *Petitioner*

v.

BOARD OF BAR COMMISSIONERS,
State of New Mexico, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of New Mexico

BRIEF FOR RESPONDENT IN OPPOSITION

J. R. MODRALL
P. O. Box 2168
Albuquerque, New Mexico 87103

ROBERT S. SKINNER
P. O. Box 220
Raton, New Mexico 87740

September 10, 1971

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On Petition for a Writ of Certiorari to the Supreme Court of New Mexico

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of New Mexico is not yet reported, but appears at Appendix A1 of the Petition herein.

QUESTION PRESENTED

Respondent, Board of Bar Commissioners of the New Mexico State Bar, pursuant to Rule 24(1) of the Revised Rules of the Supreme Court of the United States, files this brief in opposition to the petition for writ of certiorari on the ground that the case does not present a substantial federal question and on the further ground that a federal question was not timely or properly raised or expressly passed on below.

STATEMENT

This is an application for a writ of certiorari to the Supreme Court of New Mexico concerning its action suspending petitioner for 120 days from the practice of law in New Mexico.

The committee on ethics, grievances and discipline of the State Bar of New Mexico filed complaints against petitioner, an attorney practicing law at Las Cruces, New Mexico. The complaints contained five counts, charging unethical conduct in the following respects:

(1) Stirring up litigation and soliciting employment, in attending a meeting of lay persons, in violation of Canons 27 and 28.

(2) Soliciting employment as a lawyer by use of his name and telephone number in the Las Cruces telephone directory in connection with businesses other than his law practice and by use of common signs in front of his law office to advertise both that and his realty business, all in violation of Canon 27.

(3) Filing a scurrilous and scandalous pleading in a suit pending in the Third Judicial District, in violation of Canons 29 and 30.

(4) Filing litigation unjustifiably, in violation of Canon 30.

(5) Threatening to file and filing a criminal action in an attempt to collect a civil debt, in violation of Canon 15.

To the complaints the petitioner filed his answers, admitting certain of the facts but generally denying that any violation of the Canons of Ethics occurred, or that there was misconduct sufficient to warrant the imposition of discipline.

After two days of hearing evidence in Las Cruces, New Mexico, and one day in Albuquerque, the commissioners who heard the matter as referees of the Supreme Court of New Mexico filed their findings of fact, conclusions of law and recommendations. A concise summary of these findings, conclusions and recommendations as to each count is as follows:

1. As to Count 1, the report found that petitioner did attend a meeting of lay persons concerned with the problems of urban renewal and advised them of their rights and volunteered advice to bring lawsuits, in such a way as to incite the group and stir up strife and litigation. He also solicited employment, directly or indirectly, by advising the group he would represent them on a contingency basis. The report concluded that this conduct was in violation of Canons 27 and 28, and recommended that petitioner be reprimanded.

Petitioner, in the Supreme Court of New Mexico, did not object to these findings, conclusions, or recommendation.

2. As to Count 2, the report found that petitioner caused his name to be listed in 3 different places in the Las Cruces telephone directory, one place being in connection with his realty company, and also had the same telephone number for his law office and for two other businesses which were, or would have been, relative to his law practice. It further found that petitioner continued his realty business, the "A Realty Company," from the same office, or set of offices, as his law practice, using a common telephone operator. He further advertised his realty company in the Las Cruces telephone directory, showing his name, and advertised by the use of a prominent sign in front of the common offices displayed with petitioner's law office sign, with substantially the same printing. The improper telephone listings had discontinued and the realty sign had been removed at the time of hearing. The commissioners found that proof of feeding petitioner's law practice by his other businesses was not established. The report concluded that petitioner's practices in these respects violated Canon 27, and that he should be reprimanded.

Petitioner did not object to these findings, conclusions, and recommendation.

3. The report found that the facts alleged in Count 3 of the complaint, had not been established by clear and convincing evidence and that Count 3 should be dismissed.

The Supreme Court of New Mexico affirmed this dismissal.

4. As to Count 4, the report found that petitioner, knowing that an agreement between his client and another to pay money had not been performed, was

in default, and had been rescinded, nevertheless acted with his client to avoid the consequences of a rescission, and thereafter sued the other party and his lawyers without justification, with the intention of harassing and injuring them. The report concluded that the conduct of petitioner was in violation of Canon 30, and recommended that petitioner be suspended from the practice of law, with leave to apply for reinstatement after a period of 120 days.

The Supreme Court of New Mexico affirmed this finding and recommendation, and the petition for writ of certiorari is from that affirmance.

5. As to Count 5, the charge of threatening to file and filing a criminal action in an attempt to collect a civil debt, the report found that this charge had not been established by clear and convincing evidence, and therefore that Count 5 should be dismissed.

The Supreme Court of New Mexico affirmed this dismissal.

ARGUMENT

I

There Is No Important Question of Federal Law

The New Mexico Supreme Court disbarred the petitioner for actions which showed a clear disregard for the canons of ethics and his oath as an attorney. These actions demonstrated petitioner's unfitness to practice law. It has long been undisputed that the courts have the responsibility for disciplining attorneys for serious breaches of their professional responsibility. *Ex Parte Wall,* 107 U.S. 265. If the misconduct is sufficiently serious in character, the attorney may be disbarred. In speaking of disbarment proce-

dures, this court said in *Randall* v. *Brigham,* 74 U.S. (7 Wall.) 523:

> "All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney, of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceedings shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation." *Id.* at 593.

The procedures followed in New Mexico in disciplining an attorney are set out in Sec. 21-2-1(3), *N.M.S.A., 1953 Comp.* Petitioner does not question the procedures provided by the statutes, but complains that he was denied due process of law and the equal protection of the law in that the findings of fact on Count 4 were not supported by clear and convincing evidence. These findings were affirmed by the New Mexico Supreme Court. He also seems to complain that Canon 30, for violation of which he was disciplined, denies freedom of speech to a lawyer. Appellant had notice of the hearing and participated in it. He was afforded ample opportunity to explain his actions and to support his charges, both in the hearing before the bar committee and in the hearing before the Supreme Court. In the opinion below the court said:

> "The record is voluminous, nevertheless, we have carefully considered the evidence and, when it is viewed in light of the Canon, we can reach no other logical conclusion than that the respondent caused to be filed the action against Clair and his attorneys with the intent to harrass and injure the defendant."

At the outset, it would be well to set forth Canon 30:

> "30. Justifiable and Unjustifiable Litigation.
>
> The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the court as to the legal merits of his client's claim. His appearance in court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination."

With this Canon should be compared that portion of the oath of a New Mexico attorney which reads,

> "I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust . . ."

The testimony presented to the referees during the hearings was somewhat compartmentalized, as to the various counts, but in the nature of such a hearing this could not be absolutely done. The Supreme Court of New Mexico, as indicated in the opinion quoted above, did carefully review all the testimony, and it found evidence to support the referees' findings. The Supreme Court of the United States does not ordinarily review evidence or correct errors in fact finding. *United States* v. *Johnston,* 268 U.S. 220, 227; *Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271, 275; *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635; *Grayson* v. *Harris,* 267 U.S. 352, 358; *Portland R. Co.* v. *Railroad Commissioner,* 229 U.S. 397, 412; *Fry Roofing Co.* v. *Wood,* 344 U.S. 157, 160.

Summarizing the complicated facts upon which the disciplinary proceeding was based is somewhat presumptuous, and it is bound to be an over-simplification. However, at the risk of that, it will be said that petitioner filed a suit for abuse of process against the adverse party and his lawyers arising out of an earlier lawsuit for debt, which petitioner's client had lost and had resisted levy of execution. All the pleadings in both lawsuits, as well as testimony of the parties and all the lawyers involved, including petitioner, were before the referees in the disciplinary proceeding. The referees found, and the New Mexico Supreme Court affirmed,

> "4. That defendant thereafter, with respondent as his attorney, caused to be filed an action against plaintiff Clair and his attorneys, Garland, Martin and Martin, and that *it was filed with the intention of harassing and injuring the defendants.*" (Italics added.)

There is no important issue in this case, except as to petitioner himself, and this court does not ordinarily review cases which do not raise important legal problems. *Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 74. No federal statute or its interpretation is involved, merely the application of the canons of ethics to a particular fact situation. Petitioner's basic position is that the decision of the New Mexico Court is erroneous, and this Court does not ordinarily concern itself with the correction of errors in a lower court decision.

Further, it appears from the opinion of the Supreme Court of New Mexico that its decision was entirely based upon an adequate nonfederal ground. The principle that the Supreme Court of the United States

will not review such a state court judgment is therefore applicable. *Murdock* v. *Memphis,* 20 Wall. 590, 636; *Berea College* v. *Kentucky,* 211 U.S. 45, 53; *Fox Film Corp.* v. *Muller,* 296 U.S. 207; *Herb* v. *Pitcairn,* 324 U.S. 117, 125-6.

Counsel for respondent would be the last person, perhaps, to argue that when suit is brought against a brother lawyer one risks prosecution for unethical conduct. On the other hand, he would be the first to assert that such a suit should only be brought after diligent investigation into the facts and the legal basis for the claim. Claims against lawyers, alleging improper conduct, should not be lightly made. And what investigation, as to the law and the fact, do we find that petitioner made? He had not represented his client during any earlier "harassment" by the other lawyer, and did not contact that lawyer before bringing the suit. He merely took his client's word for the facts. As to the law on abuse of process (the basis of the suit), petitioner appears to have read selectively from an article in an encyclopedia on the subject. He seems to have ignored the statements therein that the process must have been used, a fact which did not happen in this case, or that if the process was null and void, as petitioner himself contended it was, there could not be a suit based upon abuse of process. His legal discussion at the grievance hearing was not that of a lawyer who had briefed his case adequately. His brief to the court in the civil suit didn't even discuss the subject, in marked contrast to the detailed brief of the defendants in that case. It seems plain that petitioner could not maintain the lawsuit on the facts, as a matter of law. That he lost this cause of action in the trial court on summary judgment only confirms this conclusion.

II

No Federal Question Was Properly Raised Below

The jurisdictional statement does not disclose any stage of the proceedings before the Bar Commission or the Supreme Court of New Mexico at which, or the manner in which, any federal question of any character was raised, except a question of freedom of speech. Neither does it purport to discuss the manner in which they were passed upon by the court. The required pertinent quotations of specific portions of the record dealing with federal questions below are wholly absent and there is no support for the assertion that the rulings of the court were of such a nature as to bring this case within the well recognized requirements for jurisdiction on application for writ of certiorari. Rule 23-1(f); *Oxley Stave Co.* v. *Butler County,* 166 U.S. 648, 655; *Ellis* v. *Dixon,* 349 U.S. 458, 460-2.

The failure of appellant to meet in any respect the requirements of Rule 23-1(f) in the jurisdictional statement, makes it difficult to determine whether, in fact, any federal constitutional question was ever raised by appellant in the court below, except that it appears the freedom of speech contention was raised in the *brief in support of the motion for rehearing.* That motion for rehearing, a copy of which is attached hereto as Appendix A, certainly does not mention any constitutional issue. Insofar as disclosed by the opinion of the Supreme Court of New Mexico, it is apparent that no constitutional question was considered by that court. There is no reference in the opinion to such an assertion by appellant and there is no ruling upon any federal question of any character. *Minnesota* v. *National Tea Co.,* 309 U.S. 551, 554;

Perkins v. *Benguet Mining Co.*, 342 U.S. 437, 441-3. This is also true of the findings and conclusions of the Board of Bar Commissioners.

Page 2 of the writ of certiorari purports to claim that petitioner was deprived of due process of law and equal protection of the law on the basis there was no specific finding of fact that appellant was convinced the litigation he instituted was intended merely to harass and injure, but nowhere does he point out his contention before the Board of Bar Commissioners or before the Supreme Court of New Mexico that he was thus denied due process and equal protection. Even in the motion for re-hearing, no such contentions appear.

In *Live Oak Water Users' Ass'n* v. *R. R. Comm'n*, 269 U.S. 354, this Court said:

> "The brief further states that by the application to the railroad commission for rehearing and in the petition to the supreme court of California for review, plaintiffs in error set up their federal claims. No citations to the record accompany this statement, as our rules require. Rule 25, 2(c). A claim merely presented to the commission upon application for rehearing would not suffice to give us jurisdiction. It must have been definitely brought to the court's attention. Although a copy of the request for rehearing addressed to the commission is annexed to the petition to the Supreme Court, this petition made no claim under the federal Constitution with sufficient definiteness for us to say that the court's attention was challenged thereto. Neither opinion of the court shows that it considered or necessarily passed upon any such question. After the second opinion, a petition for rehearing dwelt much on federal rights, but this was denied without more and is now without consequence."

It is apparent that any constitutional issue on which appellant now seeks to rely was neither brought to the attention of the referees, Board of Bar Commissioners, nor the Supreme Court of New Mexico in the manner required to permit review by this court. It is equally apparent that appellant has wholly failed to meet the requirements of the Rules of this court which are a prerequisite for the review here sought by petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition should be denied.

J. R. Modrall

Robert S. Skinner

September 10, 1971

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 8897

In the Matter of

ANTHONY F. AVALLONE, Attorney at Law

Motion for Rehearing

Respondent AVALLONE hereby moves for rehearing and specifies in support of said motion that the Opinion of this Court filed herein on April 19, 1971, is erroneous in that:

(1) The Opinion so interprets the applicable Canon 30 that lawyers are to decline to handle litigation intended by their clients to harass or injure the defendants even though the litigation may be meritorious and other motives may be present.

(2) The Opinion misstates Borst's testimony.

(3) The Opinion ignores the requirement contained in the Canon that the lawyer be convinced his client intends merely to harass or to injure the opposite party.

(4) The Opinion is unclear as to the assessment of costs against the Respondent.

/s/ PAUL A. PHILLIPS
Paul A. Phillips
Attorney for Respondent
520 Simms Building
Albuquerque, New Mexico

This will certify that a true copy of the foregoing pleading was mailed to opposing counsel of record this .... day of May, 1971.

/s/ PAUL A. PHILLIPS